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7
8 The Honorable Benjamin H. Settle
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13 **UNITED STATES DISTRICT COURT**
14 **WESTERN DISTRICT OF WASHINGTON**
15 **AT TACOMA**

16 TODD BRINKMEYER,

17 Petitioner,

18 vs.

19 WASHINGTON STATE LIQUOR AND
20 CANNABIS BOARD,

21 Respondent

22 NO: 3:20-cv-05661-BHS

23 DECLARATION OF REBECCA
24 SMITH IN SUPPORT OF BOARD'S
25 RESPONSE TO MOTION FOR
PRELIMINARY INJUNCTION

26 I, REBECCA SMITH make the following Declaration of my own personal knowledge
under penalty of perjury under the laws of the United States and the state of Washington that the
foregoing is true and correct. I am over the age of 18 and competent to testify to the matters
stated here:

27 1. In 2012, I-502, an initiative for the legalization of recreational marijuana in the
28 State of Washington, was approved by a popular vote. I was initially the Marijuana Licensing
29 Manager, and then shortly thereafter, the Director of Licensing with the Washington State
30 Liquor and Cannabis Board (Board) when I-502 was being implemented. As Licensing
31 Director, I oversee and work with hundreds of Board employees, including licensing
32 specialists, enforcement officers, and their leadership all to ensure that the Washington
33 marijuana industry runs smoothly and in accord with its intent. In my eight years working at

1 the top level of this new and evolving industry, I am intimately familiar with marijuana statutes
2 and rules, and the underlying policies which supports those laws.

3 2. In voting for I-502, the people of Washington approved a residency
4 requirement. As Washington was one of the first two states (the other being Colorado), it was
5 of paramount importance to meet the Initiative's goal to having a "tightly-regulated" industry
6 and ensure that marijuana stayed as much as possible within the borders of Washington.

7 3. I am aware that Mr. Todd Brinkmeyer, an Idaho resident, has challenged our
8 residency requirement in this State. Mr. Brinkmeyer sought to receive ownership interest from
9 Michael "Scott" Atkison, who currently has ownership interest in four marijuana retailer
10 licenses, three of which Mr. Brinkmeyer helped finance. It is not clear if Mr. Brinkmeyer
11 sought to receive ownership from all four businesses, or just the three he finances.

12 a. First, through his ownership of No. 259 Inc., Mr. Atkison owns
13 Insangu, LLC which has an 80% ownership interest in Canna4Life LLC, a marijuana
14 retailer – Mr. Brinkmeyer, through his company ATC 2, LLC loaned \$400,000 for this
15 business. Attached as **Exhibit 1** is a true and accurate copy of a Report of Application
16 demonstrating the ownership structure, and **Exhibit 2** is a true and accurate copy of a
17 Source of Funds document reflecting Mr. Brinkmeyer's contribution.

18 b. Second, again through his ownership of No 259, Inc., Mr. Atkison owns
19 Insangu, LLC which has a 50% ownership in 317 Retail, LLC, a marijuana retailer.
20 Mr. Brinkmeyer, through his company ATC 2, LLC loaned \$800,000. Attached as
21 **Exhibit 3** is a is a true and accurate copy of a Report of Application demonstrating
22 the ownership structure, and **Exhibit 4**, is a true and accurate copy of a Source of
23 Funds document reflecting Mr. Brinkmeyer's contribution.

24 c. Third, through his ownership of No 259, Inc., Mr. Atkison owns
25 Insangu, LLC which has a 50% ownership in 3213 Retail, Inc., a marijuana retailer –

1 Mr. Brinkmeyer is not a financier for this business. Attached as **Exhibit 5** is a true and
2 accurate copy of a Report of Application demonstrating the ownership structure.

3 d. Finally, Mr. Atkison has a direct 50% ownership in 2215 Retail, LLC,
4 a marijuana retailer – Mr. Brinkmeyer through his company ATC2, LLC provided
5 \$1,400,000 for this business. Attached as **Exhibit 6** is a is a true and accurate copy of
6 a Report of Application demonstrating the ownership structure, and **Exhibit 7** is a true
7 and accurate copy of a Source of Funds document reflecting Mr. Brinkmeyer's
8 contribution.

9 4. There are many reasons the residency requirement is necessary for the
10 functioning of Washington's legal marijuana industry. First, the Controlled Substances Act
11 treats any marijuana possession, transfer, and delivery, as a federal crime. After I-502 passed,
12 the federal government issued the *Cole* memorandum, which signaled to any state that chose
13 to legalize marijuana, including Washington, that if certain enforcement priorities were met,
14 the federal government would leave the state industry alone. Some of those priorities included
15 preventing sales to minors, preventing marijuana from becoming associated with criminal
16 affiliates, and preventing diversion of marijuana to other states. The *Cole* memo also generally
17 expected that States enacting “laws authorizing marijuana-related conduct” to “implement
18 strong and effective regulatory and enforcement systems that will address the threat those state
19 laws could pose to public safety, public health and other law enforcement interests.” It further
20 warned that “If state enforcement efforts are not sufficiently robust to protect against the harms
21 . . . the federal government may seek to challenge the regulatory structure itself.” While the
22 *Cole* memo has since been rescinded by Former Attorney General Jeff Sessions, it still serves
23 as the hallmark guidance that states follow, and the federal government has continued to
24 implicitly follow that guidance. To that end, the residency requirement is a foundational
25 element to maintain the robust Washington marijuana system—both in minimizing federal
26 criminal activity, as well as better ensuring that the Board can enforce the laws and rules.

1 Attached as **Exhibit 8** is true and accurate copy of the *Cole* memorandum. Attached as
2 **Exhibit 9** is true and accurate copy of a recent article entitled “2 years after Sessions Rescinded
3 Cole Memo, Prosecutors Continue to Adhere to Obama-Era Enforcement Guidelines.” Upon
4 looking at DOJ prosecutions from 2018-2020, the article concludes that the DOJ still follows
5 the Cole Memo despite it being rescinded. An online version of the article is located:
6 [https://www.benzinga.com/markets/marijuana/20/01/15093079/2-years-after-sessions-
7 rescinded-cole-memo-prosecutors-continue-to-adhere-to-obama-era-enforceme](https://www.benzinga.com/markets/marijuana/20/01/15093079/2-years-after-sessions-rescinded-cole-memo-prosecutors-continue-to-adhere-to-obama-era-enforcement)

8 5. The residency requirement ensures that all owners can actually be properly
9 investigated. All owners must undergo a financial investigation, criminal and civil background
10 investigation, interviews, fingerprinting, and other requirements in order to successfully pass
11 the Board’s vetting requirements and be eligible for licensure. In order to complete a successful
12 criminal background check, the Board needs to be able to conduct criminal background checks
13 in local Washington jurisdictions that are not available on any federal database. Even a pattern
14 of misdemeanors that may not show up on the federal database will disqualify an applicant for
15 licensure. See WAC 314-55-040. The residency requirements ensure that the Board can contact
16 local law enforcement and access the tools they have to conduct these checks. Where the owner
17 is located in another state, the ability to conduct local criminal background checks would be
18 made much more difficult—no relationships with local and state law enforcement, 49 States
19 with 49 different types of local criminal background systems, and states where marijuana is
20 illegal could be understandably reluctant to help out another state where it has been legalized.

21 6. The residency requirement for owners also ensures a physical presence so that
22 our criminal and marijuana laws may be prosecuted in the event the owner, and its business,
23 violates our laws. The Board requires that all owners of the business be responsible for the
24 conduct of the business, their employees, and even visitors on the premises.
25 WAC 314-55-110(4). Enforcement officers need the ability to access the physical marijuana
26 locations and to be able to interview owners in the case of an alleged conduct violation

1 occurred. While employees or another representative could perhaps help Enforcement conduct
2 its investigation, it is the owner(s) who must be able to answer for any marijuana regulatory
3 violations or criminal activity. If, for example, a marijuana retailer sets up the business so that
4 it routinely sells to minors or diverts marijuana, it becomes more than a regulatory issue at that
5 point, and the owner needs to be held accountable for its criminal activity, which can be
6 prosecuted under local Washington law.

7 7. Furthermore, in part because of marijuana' federal illegality, Washington
8 Enforcement Officers cannot enforce marijuana laws in another State. They are limited to
9 Washington State. I am aware that unlike the Board's Enforcement Officers, the Washington
10 State Gambling Commission's Enforcement Officers *can* leave Washington to enforce
11 gambling laws, including even going outside the country if need be to conduct investigations.

12 8. In addition, I-502 empowered local jurisdictions to object to any marijuana
13 applicant within their area. RCW 69.50.331(7). This can reveal details about an individual that
14 the Board may not be aware of, including threats to public safety, that may necessitate the
15 denial of the applicant for a marijuana license. If marijuana licensees could be out-of-state, the
16 Board would lose this meaningful perspective in evaluating marijuana applicants and
17 determining whether they should be issued a license. The Washington residency requirement
18 is needed to hold those who decide to own a precarious and highly regulated business to be
19 within the bounds of the State so to be properly investigated and held responsible.

20 9. There is a separate, but also important basis for the residency requirement.
21 Washington, unlike any other state that has legalized marijuana, has a tiered system. That
22 means an individual or business can only participate on one side of the industry—either, the
23 marijuana retailer side, or the marijuana production and processing side. As Washington's
24 marijuana system was intended to be similar to the liquor industry, the goal of which was to
25 prevent "tied houses," where liquor became big business and invited criminal activity by not
26 limiting the bounds of one enterprise's influence. To my knowledge, no other state has

1 Washington's set-up. By eliminating the residency requirement, Washington's tiered
2 marijuana system, as set up by the people of Washington, would be undermined. This is
3 because any other State resident could be involved with marijuana production, retail, or even
4 both in their own State, and then apply to be a retailer or producer in Washington—the best
5 enforcement mechanism we would have is to “ask” the individual whether they are involved
6 with marijuana—but they could simply lie. Given the illicit nature of the industry, there would
7 be a high incentive for individuals looking to be involved on both sides of the industry to try
8 to slip in out-of-state, where as described above, it is simply harder to investigate and confirm
9 the details of any marijuana applicant. As demonstrated by the some of the LLC set up of
10 Mr. Atkison's ownership in his marijuana retailers, the corporate structure can become very
11 complicated and make it difficult for the Board to track down whether the individual is in fact
12 involved with marijuana outside of Washington.

13 10. This problem is further compounded by the fact that Washington only allows
14 one individual/business to own up to five marijuana retailer licenses. RCW 69.50.325(3)(b).
15 Such a limitation ensures that big business and criminal activity cannot dominate the market
16 in State—but if residency were eliminated, this safeguard to Washington's marijuana industry
17 would be threatened because it would be difficult to know who already is involved with other
18 retailers in other states. By keeping all ownership of marijuana businesses in Washington, we
19 can work within our State's regulatory structure to ensure the tiered system and limitation on
20 marijuana licenses remains intact.

21 11. As tightly regulated as this industry has been, the Board has continued to listen
22 to its constituents and loosened restrictions to the extent it can without risking public safety or
23 Washington's marijuana structure. For example, financiers were previously required to be
24 Washington residents, but industry stakeholders in conversation with the Board determined
25 that vetting of a financier can be accomplished without residency. This makes sense because
26 financiers, generally speaking, are limited to providing loans on a fixed interest rate to

1 marijuana licensees. That is it—they are purely investors. While the vetting of financiers and
2 owners is similar, it is not exactly the same. The investigation into an owner is more searching
3 and thorough as compared to a financier. By way of example, Licensing Specialists and
4 Enforcement Officers will spend more time reviewing the character of an owner, including
5 local criminal background checks not available out of state. An out-of-state financier is not
6 subject to the same local background scrutiny (because of the difficulty as described in
7 Paragraph 5). Another difference is a financier's funds can be more easily traced because they
8 have a one-time determinate amount of money that they are investing. The vetting process for
9 that is straightforward. Comparatively, an owner's financial accounts receive additional vetting
10 as they are more dynamic in nature; they can be used to deposit and withdraw revenue/profits
11 from marijuana business, so additional tracking is required so the ebb and flow of marijuana
12 money can be tracked. Moreover, owners are held responsible for the operation of the business,
13 regulatory compliance, and for any criminal conduct that may occur. WAC 314-55-110(4).
14 Because of the level of accountability between financiers and owners, there is less of a need
15 for financiers to be domiciled in the State. In contrast, an owner must be located here so that
16 they oversee business operations, timely respond to investigations, be present for inspections
17 as needed, and properly respond to the Board's requests for documents or information,
18 *see* WAC 314-55-185.

19 12. In addition, the Board believes the six-month residency requirement is the
20 shortest amount of time that accomplishes the goals discussed above. When I-502 was initially
21 passed, it was only a three-month residency requirement. While we would have liked to make
22 that work, we had issues with individuals who came into Washington for three months for the
23 sole purpose of receiving a marijuana license and then would leave the State. This caused
24 issues on the licensure side as well, as applications often take three months or more to process,
25 so they would start out qualifying, but by the end, would not. To that end, Second Engrossed
26 Second Substitute House Bill 2136 in 2015 was passed that raised the residency requirement

1 from 3-months to six months. In my opinion, this small increase has better achieved the policies
2 of the residency requirements set forth in this Declaration.

3 13. It is no secret that if marijuana is federally legal, that may be a time for another
4 discussion on whether a residency requirement is needed. Though I would have concerns it
5 may still affect Washington's tiered-system, we would be able to make it more like liquor or
6 tobacco, which are federally legal. Banks then too would have regulations in place to accept
7 marijuana money and their own safeguards to ensure a marijuana business remains legal. As it
8 stands now, however, only state-chartered banks and credit unions and none of the large
9 federally-chartered banks will take marijuana money, and marijuana is still often times a cash-
10 based business.

11 14. I also understand that other States have chosen to not include a residency
12 requirement in their marijuana system. While that may work for them, other states have issues
13 with overproduction and diversion of marijuana out of state, like Oregon, where no residency
14 requirement exists. Overproduction of marijuana is a common issue that leads to diversion, as
15 marijuana licensees will become desperate and sell out of state to earn money to keep their
16 business afloat. Even Exhibit C, an article attached to the Declaration of Andy Murphy, on
17 page 9 reflects that the elimination of the residency requirement may have caused Oregon to
18 be the "target of federal attention due to marijuana diversion" due to its overproducing
19 marijuana. For convenience, a true and accurate copy of that article is attached as **Exhibit 10**.
20 That article on page 4 also states that "[t]he main cost of residency requirements is loss of
21 funding." That concern is not as great in Washington anymore, because as previously
22 discussed, we have allowed out-of-state financiers to provide money and loans to marijuana
23 retailers. I am also proud to say that Washington's marijuana regulations have ensured that
24 70% of marijuana in Washington right now has come from legal sources, displacing the illegal
25 market. While that number may seem low, it is one of the highest in the nation for legal
26 marijuana production.

1 15. Other states, including Mr. Brinkmeyer's residence, Idaho, have chosen to not
2 even decriminalize marijuana. Attached as **Exhibit 11** is a true and accurate copy of an
3 explanation of laws and map detailing the current legality of marijuana in each state (retrieved
4 online at <https://disa.com/map-of-marijuana-legality-by-state>). Without the residency
5 requirement, Mr. Brinkmeyer—and other residents of Idaho—could start getting into
6 Washington marijuana business, much, I imagine, to Idaho's concern for public safety. The
7 US District Attorney in Idaho could exercise its discretion and determine that ownership goes
8 one-step too far—and Idaho residents are subject to criminal prosecution. The residency
9 requirement, therefore, not only protects the integrity of our State's legal marijuana system, it
10 better respects other States that have chosen not to legalize marijuana and protects those
11 citizens from criminal prosecution.

12 16. I am aware that Mr. Brinkmeyer is attempting to take action to immediately
13 eliminate the residency requirement not only for himself, but for everyone. The impacts on our
14 agency, especially during the COVID-19 pandemic, would be devastating. The COVID-19
15 pandemic has caused the Board employees to take monthly furloughs due to budget shortfalls
16 and to telework; this has impacted our work to a degree. The Board has already been following
17 emergency declarations issued by the Governor to ensure that marijuana and liquor businesses
18 can remain open safely, but that is an ongoing and evolving process. If the requirement were
19 removed, not only would we deal with the impact of COVID-19, it would be anticipated that
20 potentially hundreds of new applications for ownership would come flooding into our office—
21 causing delays which may subject the Board to lawsuits and costing State tax dollars. This is
22 because along with individuals simply wanting to be owners of Washington marijuana
23 businesses, many individuals have contracted with each other to have a "first buyer" right if
24 Washington ever lost its residency requirement. If it was later determined the residency
25 requirement was valid by a later ruling, to reverse all of that work by the Board would be an
26 almost impossible task—in essence, the Board would have to revoke marijuana licenses for

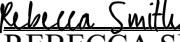
1 having individuals that are not state residents. This would greatly impact the Washington
2 marijuana industry.

3 17. In my opinion as Licensing Director for the last eight years and a dedicated
4 advocate for the integrity of Washington's marijuana industry, it is paramount that the
5 residency requirement be maintained.

6 Pursuant to 18 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is
7 true and correct to the best of my knowledge.

8 Signed this ²⁴ _____ day of August, 2020, at Olympia, Washington.

9 DocuSigned by:

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REBECCA SMITH
11 Licensing Director
Washington State Liquor and Cannabis Board

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